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No. 80-57

In the Supreme Court of the United States

OCTOBER TERM, 1979

DOUBLE "Q," INC., PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that it was entitled to de novo review of all disputed issues of fact in this proceeding to enforce civil penalties for violations of safety standards promulgated under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.*

1. The enforcement scheme of the 1969 Act is summarized in *National Independent Coal Operators' Ass'n* v. *Kleppe,* 423 U.S. 388, 391-393 (1976).[1] In brief, the Act

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[1]The 1969 Act was extensively amended by the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290. The 1969 Act was renamed the "Federal Mine Safety and Health Act of 1977," 30 U.S.C. (Supp. II) 801 *et seq.* The new Act transferred enforcement jurisdiction to the Department of Labor, and, as we note below, the issue presented by this petition cannot arise under the new law.

required regular inspections by federal mine inspectors of mines covered by the Act to detect violations of mandatory health or safety standards. 30 U.S.C. 813. Upon finding such a violation, the inspector would issue an order requiring the withdrawal of all persons from the danger area or a notice requiring the abatement of the condition within a specified time, depending on the seriousness of the hazard posed by the violation (Section 814). The operator could obtain a full evidentiary hearing to review the basis of any order or notice issued by an inspector (or the time set for abatement), with judicial review under the substantial evidence standard in the appropriate court of appeals (Section 816). The Act also required the Secretary of the Interior to assess and collect civil penalties after considering specified factors (Section 819(a)(1)). If the operator failed to pay the assessed penalty, the Secretary was required to petition for judicial enforcement of the assessment in the appropriate district court (Section 819(a)(4)). That Section, which is the one at issue here, provided that in the enforcement proceeding, "[t]he court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals under section 816 of this title, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury."

2. Between late 1975 and early 1976, inspectors from the Interior Department's Mining Enforcement Safety Administration (MESA) conducted inspections of petitioner's coal mine in Claiborne County, Tennessee. The inspectors issued a total of 25 notices of violations of applicable health and safety standards, and MESA assessed a civil penalty for each of the violations. An administrative hearing was then held to determine whether the violations had occurred and, if so, what penalties should be assessed. On February 4, 1977, the Administrative Law Judge found that petitioner

had committed all 25 violations and assessed petitioner civil penalties totaling $1,823 (Pet. App. 19-20). Petitioner did not seek review of the factual findings in the court of appeals under 30 U.S.C. 816, nor did it pay the penalties.

In September 1977, the government filed a petition for enforcement of the penalties in the United States District Court for the Eastern District of Tennessee. Petitioner requested a jury trial and sought de novo consideration of both the question of liability and the amount of the penalties (Pet. App. 20). The district court denied the request for de novo consideration of the issue of liability, but it granted de novo review of the amount of the penalties (Pet. App. 18-27). Because the issues of fact relating to whether the violations occurred were "facts of the same type as those reviewed by appellate courts, under Section 816" (Pet. App. 23), the court held that those issues of fact should be considered in the district court under the same standard as would be employed in the court of appeals: review under the substantial evidence test rather than de novo consideration (Pet. App. 22-24). In contrast, issues relating to the application of the statutory criteria to determine the amount of the penalties would not be subject to review in the court of appeals under Section 816. The district court accordingly held that those issues were properly for de novo consideration in the district court, with the jury resolving all disputed issues of fact. Applying these principles, the district court held that substantial evidence supported the administrative determination that the charged violations occurred. The jury assessed a total penalty of $1,181 for the 25 violations, a figure that the district court approved as reasonable. The court therefore entered a final judgment in that amount.

The court of appeals affirmed in a brief unpublished order (Pet. App. 15-16; 617 F. 2d 602 (1980) (table)). The court agreed with the district court that under the 1969 Act the issue of liability was subject to "substantial evidence" review

rather than de novo consideration. With respect to the penalty assessment, the court held that under the statute it was for the district court to determine the amount of the penalty, and that the role of the jury should have been limited to "making any necessary findings of fact relevant to the amount of the penalty" (Pet. App. 16). However, because the district court ultimately determined the amount of the penalties, the court of appeals held that the use of the jury did not prejudice petitioner and that a remand under the circumstances was unnecessary (*ibid.*).

3. The judicial review provisions of the Federal Mine Safety and Health Act of 1977, which superseded the provisions governing the instant case, are substantially different from those at issue here. The only provision in the 1977 Act for judicial review of civil penalties is Section 106, 30 U.S.C. (Supp. II) 816, which provides that petitions to review civil penalty assessments go directly to the court of appeals. If the aggrieved party seeks review of any Federal Mine Safety and Health Review Commission order, the Commission's findings of fact are subject to review under a substantial evidence standard. 30 U.S.C. (Supp. II) 816(a)(1). But if the aggrieved party does not seek review of the Commission's determination within 30 days, the Secretary of Labor may file a petition for enforcement in the court of appeals; in such an action, the Commission's findings of fact are conclusive. 30 U.S.C. (Supp. II) 816(b).[2]

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[2]Alternatively, the Commission may enforce the civil penalties by an action in the appropriate district court under 30 U.S.C. (Supp. II) 820(j). That Section provides simply that the assessed penalties "may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office." Similar statutory provisions do not permit judicial review of the order to be enforced, where there has been a previous opportunity to seek judicial review. *United States* v. *Jan Hardware Mfg. Co.*, 463 F. Supp. 732, 734 (E.D.N.Y. 1979), and cases there cited; see *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 447 (1977).

The issue of statutory construction presented in this case is therefore of no continuing importance.[3] As petitioner concedes (Pet. 13), this is the only court of appeals that has addressed this issue to date.[4] There is thus no reason for the Court to grant review in this case.

4. In any event, we believe the district court and the court of appeals correctly concluded that petitioner had no right to de novo review of the determination that it had violated the mandatory safety regulations. That determination was based on "issues of fact which * * * could have been litigated in review proceedings before a court of appeals under section 816" (Section 819(a)(4)), and accordingly was expressly exempt from de novo review in a Section 819 proceeding.[5] Although, as this Court noted in *National*

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[3]Although the 1977 Amendments became effective in early 1978, there are several thousand cases pending in various stages of administrative and judicial review that may involve the application of the 1969 procedures at issue here. It is not clear whether liability will be contested in any significant proportion of those cases, or, indeed, whether the old procedures apply to cases that were at an early stage of review when the new Act became effective.

[4]The decision of the court of appeals here, which was entered by unpublished order, will have only limited precedential value. 6th Cir. R. 11.

[5]Petitioner apparently suggests (Pet. 9) that it could not in fact have challenged the factual basis of the order under Section 816 because it was never subject to a withdrawal order. Section 816 permitted review of "[a]ny order or decision issued by the Secretary * * * under this chapter, except an order or decision under Section 819(a) of this title." That language evidently permits review not only of withdrawal orders, but also of notices of abatement and the time limits prescribed, which were expressly made subject to administrative review by 30 U.S.C. 815(a). Petitioner in fact obtained such review. In context, an "order or decision under section 819(a)" referred only to an order or decision assessing the penalty by applying the statutory factors.

Independent Coal Operators' Ass'n v. *Kleppe, supra,* 423 U.S. at 393 n.3, "[t]he statutory scheme is less than clear on this matter," we submit that both the language of the statute and the interests of judicial economy strongly support this reading.[6] Moreover, as the district court noted (Pet. App. 23), there is no apparent reason why the operator should be entitled to de novo review of the factual basis of the violation in the district court, while he would only have been entitled to substantial evidence review of the same question if he had raised it earlier in the court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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[6]We have previously suggested that the exemption applied only when the operator had in fact filed a petition for review under Section 816 (Brief for Petitioner at 22 n.27, *Kleppe* v. *Delta Mining, Inc.*, 423 U.S. 403 (1976)). We now believe that interpretation was unduly narrow.

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